A **TETUAN SULAIMAN & TAYE v. WONG POH KUN & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-364-08-2018]
8 JULY 2020

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COMPANY LAW: *Directors – Liabilities – Default by company in payment for legal services rendered – Company wound up – Whether directors liable – Whether directors carried out business with intent to defraud creditors of company – Whether company's monies dissipated by directors with intent to benefit themselves –*
C *Whether directors personally liable for debts – Companies Act 2016, s. 540*

The plaintiff, a law firm, initiated a civil suit ('Suit 288') against Bistari Land Sdn Bhd ('Bistari Land') for default in payment for legal services rendered in respect of various litigations involving certain pieces of land ('lands') belonging to Bistari Land. The plaintiff then entered a judgment in default
D ('JID') for the sum under the bill amounting to RM5,907,500. Bistari Land filed a petition seeking to tax the bill ('petition') and also applied to set aside the JID. Subsequently, the plaintiff and Bistari Land agreed for the bill to be taxed and by consent the JID was set aside and Suit 288 was withdrawn. Before the hearing of the petition the plaintiff filed an application in the
E petition to 'earmark' a sum of RM6,000,000 out of a sum of RM32,193,108.35 which was due to be received by Bistari Land pursuant to the sale of its lands. The 'earmark' application, which was in effect an application for a *Mareva* injunction, was essentially to compel Bistari Land to set aside the sum of RM6,000,000 from the proceeds of sale of its lands
F as security for the plaintiff's bill. However, the injunction application was dismissed and the plaintiff did not appeal against the decision. Before the petition was heard, Bistari Land was wound up and therefore, the plaintiff proceeded to file a proof of debt with the Insolvency Department for the sum of RM5,907,500. Bistari Land had not informed the court or the plaintiff or
G in the petition that the Government of Malaysia had obtained a summary judgment against Bistari Land for the sum of RM4,042,272.28 and that the Government of Malaysia had served Bistari Land with a statutory demand for the sum of RM5,651,663.48 under s. 218 of the Companies Act 1965 ('CA 1965') pursuant to the summary judgment. The plaintiff was also not
H told that a winding-up petition had been filed against the company by the Government of Malaysia. Hence, this application by the plaintiff against the defendants, the directors and mandatory signatories of Bistari Land, the determination of which rested on the interpretation of s. 304(1) of the CA 1965 and whether the facts of this case fell within the meaning of that subsection. The defendants denied personal liability to the plaintiff for the
I bill, which was rendered to Bistari Land and owed by Bistari Land to the plaintiff.

Held (allowing application):

(1) Section 304(1) of the CA 1965 and the present s. 540(1) of the Companies Act 2016 ('CA 2016') applies when the business of the company has been carried out with the intent to defraud the creditors or for any fraudulent purpose. Fraudulent trading arises where: (i) the business of the company had been carried on with intent to defraud creditors or with a fraudulent purpose; and (ii) the defendants were knowingly parties to the carrying on of the business in that manner; or (iii) after the company had incurred the debts, steps are taken with the intent to avoid making payment to the creditors. Bistari Land had received the three tranches of payments from the proceeds of sale of the lands and had used to pay its creditors. However, Bistari Land did not pay the Government of Malaysia's statutory demand which led to the filing of the winding-up petition against the company and there was no explanation given by the second defendant. (paras 31, 34, 47 & 48)

(2) To be knowingly party to the fraud, the person does not have to know every detail of the fraud or how it is to be perpetrated. It is sufficient if he has a 'blind-eye' or 'Nelsonian' knowledge, *ie*, deliberately shutting his eyes to the obvious that fraud was involved. Based on the second defendant's inability to provide any explanation as to how the money was dealt with, notwithstanding that he was a mandatory cheque signatory of the company's account, the court could draw an adverse inference that the proceeds had been dissipated by both the defendants with the intent to benefit themselves and to defraud the plaintiff and the Government of Malaysia. At the very least, the second defendant was knowingly a party to the carrying on of the dissipation under the first defendant's directions. Further, the second defendant's refusal or inability to provide any explanation on the whereabout of the proceeds was a conscious withholding or suppression of evidence. (paras 62 & 64)

(3) There was no reason for the plaintiff to call the liquidator as a witness as it was the first and second defendants who had the direct and personal knowledge on the dealings with regards to the three tranches of payments received. Accordingly, the plaintiff had established, on the balance of probabilities, that both the first and second defendants had indeed carried on the business of Bistari Land with the intent to defraud the creditors of the company or for fraudulent purposes or are persons knowingly parties to the carrying on of the business in that manner and by reason thereof shall be personally responsible for both the debt of the plaintiff and the Government of Malaysia. (paras 65 & 66)

(4) The words '… personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs' are sufficiently wide for the court to order that the delinquent makes the payment directly to the defrauded creditor where

the court finds justifiable circumstances to do so. The court's power was not confined in ordering that the defendants be personally liable for the sum of RM5,907,500 owed by Bistari Land to the plaintiff. The defendants could also be ordered to be personally liable for all the debts of Bistari Land that were payable at the time the sum of RM71,310,616.46 were received by the company but were wrongly dissipated by the defendants. The court's finding that the business of Bistari Land had been carried on by the defendants with the intent to defraud the creditors of the company or for fraudulent purpose must equally apply to other creditors whose debts were still outstanding at the material time which the defendants had, by their conduct, clearly shown an intention not to pay and instead redirected the monies elsewhere. (paras 83 & 88)

(5) Where a claim was made under s. 304(1) of the CA 1965 or s. 540(1) of the CA 2016, and the company has already been wound up, unless there are good reasons, any payments by the delinquent directors of the company or persons, who knowingly are parties to the carrying on of the business in that manner, ought to be paid to the liquidator as contribution to the company's assets instead of an order for the payment to be made directly to the defrauded creditor who filed the claim. This is to avoid a satiation where a creditor is preferred over other creditors. The defendants were jointly and severally liable to pay the sum of RM5,907,500 and the sum due to the Government of Malaysia to the liquidator of Bistari Land as contribution to the assets of the company. Both the defendants were jointly and severally liable to pay the sums so declared within 30 days from the date of service of the order. (paras 89 & 92)

Case(s) referred to:

Chin Chee Keong v. Toling Corporation (M) Sdn Bhd [2016] 6 CLJ 666 CA ***(refd)***
Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors [2012] 1 LNS 734 HC ***(refd)***
Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 10 CLJ 385 FC ***(refd)***
Gerald Cooper Chemicals [1978] 2 All ER 49 ***(refd)***
Huatah Sdn Bhd v. Yap Chee Kian & Ors [2020] 2 CLJ 560 HC ***(refd)***
JCT Limited v. Muniandy Nadasan & Ors And Another Appeal [2016] 3 CLJ 692 CA ***(refd)***
Joint Management Body of Gurney Park Condominium v. Majlis Perbandaran Pulau Pinang [2013] 10 MLJ 600 ***(refd)***
Kuthubul Zaman Bukhari & Anor v. Tsai Su Chu & Ors [2013] 9 CLJ 524 HC ***(refd)***
LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC ***(refd)***
Malhotra v. Dhawan [1997] EWCA Civ 1096 ***(refd)***
Morris v. Bank of India [2004] 2 BCLC 279 ***(refd)***
Muniandy Nadasan & Ors v. Dato' Prem Krishna Sahgal & Ors [2016] 1 LNS 592 HC ***(refd)***
Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors [2006] 7 CLJ 364 HC ***(refd)***
Re Cyona Distributors Ltd [1967] 2 WLR 369 ***(refd)***

Re Esal (Commodities) Ltd, London and Overseas (Sugar) Co Ltd And Another v. Punjab National Bank [1997] BCLC 705 ***(refd)***
Re Sarflax Ltd [1979] 2 WLR 202 ***(refd)***
Re William C Leitch Bros Ltd (No 1) [1932] Ch 71 (Ch D) ***(refd)***
Re William C Leitch Bros, Ltd (No 2) [1932] All ER Rep 897 ***(refd)***
Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 292, 304(1), (7), 218, 365(1)
Companies Act 2016, ss. 245(3), 540(1), (7)

Companies Act 1929 [UK], s. 275
Companies Act 1948 [UK], s. 332(1)
Insolvency Act 1986 [UK], s. 213

For the plaintiff - Hazman Ahmad; M/s Omar Ismail Hazman & Co
For the 2nd defendant - Kho Zhen Qi & LK Ng; M/s Ng, Gan & Partners

Reported by S Barathi

JUDGMENT

Ong Chee Kwan JC:

[1] This judgment deals with s. 304 of the Companies Act 1965 ('CA 1965') which is now s. 540 of the Companies Act 2016 ('CA 2016'). In particular, whether directors of a company who are mandatory signatories to the company's bank accounts but are unable to provide any satisfactory explanation as to how monies received from the disposal of the company's sole asset were expended or dealt with and causing the company to become unable to pay its debts to its creditors and subsequently wound up, can be said to have carried on the business of the company with the intent to defraud its creditors or for fraudulent purpose.

[2] The judgment also explores whether the delinquent directors who are ordered to assume personal liability of the debts of the company under s. 304(1) of the CA 1965 should make the payment directly to the applicant under the section or to pay the sums into the assets of the company to be distributed *pari passu* to all general creditors in a case where the company has been wound up.

Background Facts

[3] Bistari Land Sdn Bhd ('Bistari Land') was a company incorporated in Malaysia with Wong Poh Kun ('WPK') and Wong Poh Lum ('WPL') as directors since 29 November 2000 and 28 June 2002 respectively. WPK and WPL are the first and second defendants in this action. Both WPK and WPL were mandatory signatories to the bank accounts of Bistari Land.

[4] WPK was adjudged a bankrupt on 15 October 2019. Leave to proceed with this action against WPK was obtained by the plaintiff from the bankruptcy court on 3 February 2020. He was not represented at the trial.

[5] The plaintiff is a law firm. Sometime in 2010, the plaintiff was engaged by Bistari Land to render legal services in respect of various litigations involving certain pieces of land ('the lands') belonging to Bistari Land.

[6] For the legal services rendered, sometime on 2 July 2014, the plaintiff issued a bill no. 0073 for RM5,907,500 ('the bill').

[7] As no payment was received from Bistari Land on the Bill, the plaintiff initiated a civil suit against Bistari Land under Kuala Lumpur High Court Suit No. 22NCC-288-08-2014 in August 2014 to recover the sum due thereunder ('suit 288').

[8] On 12 September 2014, the plaintiff entered judgment in default of appearance against Bistari Land in Suit 288 for the sum under the bill ('judgment in default').

[9] In December 2014, Bistari Land filed a petition against the plaintiff seeking to tax the bill ('taxation') *vide* the Kuala Lumpur High Court Petition No: 26NCC-108-11-2014 ('the petition'). At about the same time, Bistari Land applied to set aside the judgment in default.

[10] Subsequently, the plaintiff and Bistari Land agreed for the bill to be taxed and by consent, the judgment in default was set aside and Suit 288 was withdrawn on 7 July 2015.

[11] Before the petition was heard in November 2015, the plaintiff filed an application in the petition on 18 August 2015 to 'earmark' a sum of RM6,000,000 out of a sum of RM32,193,108.35 which was due to be received by Bistari Land on or about 1 October 2015 pursuant to the sale of its lands. The 'earmark' application was essentially to compel Bistari Land to set aside the sum of RM6,000,000 from the proceeds of sale of its lands as security for the plaintiff's bill. It was in effect an application for a *Mareva* injunction ('the injunction application').

[12] Bistari Land had sold the lands to one Sanjung Tropika Development Sdn Bhd ('Sanjung Tropika') for an estimated RM400 million under a sale and purchase agreement dated 1 October 2013 ('the SPA'). There is no dispute that from the proceeds of sale of the lands under the SPA, after settling the sum owing to Maybank and Lembaga Lebuhraya Malaysia, Bistari Land was due to receive three further tranches of payments amounting to RM71,310,614.46, namely, (i) RM16,590,062.54 upon the presentation of the titles for registration; (ii) a further RM22,527,442.57 by 31 May 2015 and (iii) a final RM32,193,108.35 by 30 September 2015 ('the three tranches').

[13] The plaintiff filed the injunction application because of concerns that WPK would transfer the monies, in particular, the final tranche of RM32,193,108.35 under the SPA belonging to Bistari Land to himself and

or his companies overseas. The lands were the only assets of Bistari Land. At the time, Bistari Land had not filed any annual accounts or returns since 2005.

[14] On 11 September 2015, WPL affirmed and filed an affidavit opposing the plaintiff's injunction application ('WPL's affidavit'). The relevant paragraphs of WPL's affidavit are:

> 5. (ii) Tindakan yang dimulakan oleh pihak Responden-Responden melalui firma mereka iaitu T/n Sulaiman & Taye untuk menuntut terhadap Pempetisyen untuk suatu jumlah sekadar RM5,907,500.00 berdasarkan Bil No. 0073 dalam Mahkamah Tinggi Kuala Lumpur Guaman No. 22NCC-288-08/2014 ("Guaman 288") telahpun diberhentikan dan ditarik balik oleh pihak Responden-Responden sendiri tanpa kebebasan untuk memfailkan semula menurut Perintah Persetujuan yang dimasukkan antara pihak-pihak di sini berkenaan Bil No. 0073 pada 7/7/2015.
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> 6. Memandangkan tiada apa-apa tindakan yang dimulakan oleh pihak Responden-Responden untuk jumlah sebanyak RM6,000,000.00, saya dinasihati oleh peguam Pempetisyen dan sesungguhnya percaya bahawa pihak Responden-Responden tidak mempunyai "strong *prima facie* case' dan atau "good arguable case" terhadap pihak Pempetisyen untuk jumlah sebanyak RM6,000,000.00 tersebut.
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> 17. Selaras dengan itu, saya juga menyatakan bahawa tiada apa-apa kebahayaan bahawa pihak Pempetisyen akan menyusutkan ('dissipate') aset-asetnya demi mengelak daripada membayar fi guaman Responden-Responden. Kenyataan ini jelas kelihatan apabila pihak Pempetisyen pernah membayar pihak Responden-Responden fi-fi guaman berjumlah RM484,750.00 tersebut dari semasa ke semasa apabila diminta oleh pihak Responden-Responden. Pihak Pempetisyen tidak membayar fi guaman untuk Bil No. 0073 kerana jumlah sebanyak RM5,907,500.00 yang dicajkan oleh pihak Responden-Responden melalui Bil No. 0073 tersebut jelasnya tidak munasabah dan 'grossly excessive'.
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> 21(6) Saya dinasihati oleh peguamcara Pempetisyen dan sesungguhnya percaya bahawa Pempetisyen hanya dianggap sebagai 'commercially insolvent' jika Pempetisyen tidak mampu membayar hutang dibawah Seksyen 218 Akta Syarikat 1965 dan bukan seperti yang didakwa oleh pihak Responden-Responden di perenggan 10 Afidavit Sng.
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> 21(7) Selain itu, rekod "company charges" di m/s 5-9 carian CCM [Ekshibit "SEK-1" Afidavit Sng] menunjukkan bahawa Pempetisyen telah melangsaikan kesemua caj-cajnya. Ini menunjukkan bahawa Pempetisyen tidak akan mengelakkan diri daripada membayar pemiutang-pemiutangnya dan menyokong pendirian Pempetisyen bahawa tiada apa-apa kebahayaan bahawa pihak Pempetisyen akan menyusutkan aset-asetnya.'

[15] The plaintiff's aforesaid injunction application was not successful. No evidence was adduced at the trial to shed light on the High Court Judge's grounds for dismissing the injunction application. The plaintiff did not file an appeal against the decision.

[16] However, before the petition was heard on its merits, Bistari Land's solicitors wrote to the court to inform that Bistari Land had been wound up on 29 January 2016 by the Government of Malaysia.

[17] The plaintiff then proceeded to file a proof of debt with the Insolvency Department against Bistari Land for the sum of RM5,907,500. The proof of debt has been admitted by the Insolvency Department.

[18] Bistari Land had not informed the court or the plaintiff in Suit 288 or in the petition that the Government of Malaysia had obtained a summary judgment against Bistari Land on 5 May 2010 for the sum of RM4,042,272.28 ('the summary judgment') in Suit No: S5-21-64-2008 ('Suit 21') and that the Government of Malaysia had served Bistari Land with a statutory demand dated 21 April 2015 for the sum of RM5,651,663.48 as at 20 April 2015 under the then s. 218 of the CA 1965 pursuant to the summary judgment ('the statutory notice'). The plaintiff was also not told that a winding up petition had been filed against the company on 26 October 2015 by the Government of Malaysia ('the winding-up petition').

[19] By reason of the aforesaid, the plaintiff filed this action against WPK and WPL alleging that:

(i) Bistari Land had sold the lands under the SPA for the sum of RM429,868,897.92 on 1 October 2013;

(ii) although the proceeds of sale under the SPA of the lands had been paid, WPK and WPL had failed to procure Bistari Land to pay the bill to the plaintiff;

(iii) instead, WPK and WPL filed the petition and did not disclose to the plaintiff and/or the court of the summary judgment, the statutory demand and/or that the winding-up petition had been filed against Bistari Land;

(iv) WPK and WPL had dissipated the proceeds of sale under the SPA. In particular, the plaintiff alleged that a sum of RM4,999,991 that was transferred into Bistari Land's account on 18 June 2014 by the conveyancing stakeholder, was transferred out to WPK's personal account the following day on 19 June 2014. After receiving the sum of approximately RM70 million being the balance of the proceeds of sale under the SPA for the lands, WPK and WPL had failed to utilise the same to pay the plaintiff and the Government of Malaysia and instead had acted to deprive them of the debts and had dissipated the proceeds to themselves; and

(v) by reasons of the aforesaid, the plaintiff claimed that WPK and WPL had knowingly and intentionally carried on the business of Bistari Land to defraud the plaintiff while continuing with the proceedings under the petition and are liable to the plaintiff under s. 304(1) of the CA 1965. More specifically, it is the plaintiff's case that by the WPL's affidavit, WPL had fraudulently stated that Bistari Land was commercially solvent when in fact Bistari Land had been served with the statutory notice and had the summary judgment against it by that time. In WPL's affidavit, it was averred that there was no risk of dissipation of Bistari Land's assets, yet the proceeds of the sale of the lands had been transferred out to WPK's personal account.

[20] The defendants denied that they are in any way personally liable to the plaintiff for the bill which was rendered to Bistari Land and owed by Bistari Land to the plaintiff.

[21] The bill had not been taxed pursuant to the petition by reason of the winding up of Bistari Land. The plaintiff had only filed a proof of debt for the bill with the liquidators of Bistari Land at that time. In any event, the defendants claimed that Bistari Land had paid a sum of RM484,750 to the plaintiff and this was in full and final settlement of the plaintiff's services. The bill was in any case grossly excessive. In short, during the relevant period, Bistari Land had no legal obligation to pay the plaintiff's bill.

[22] The defendants denied that the transfer of RM4,922,008 to WPK's personal account on 19 June 2014 was to defraud the plaintiff as Bistari Land was only issued with the bill sometime on 2 July 2014. It is illogical that the defendants had transferred the monies to avoid the payment of the bill when the bill had not even been issued at the time of the transfer.

Court's Analysis

[23] As alluded to above, the plaintiff based its claim on s. 304 of the CA 1965 which provides:

> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
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> (2) Where a person has been convicted of an offence under subsection 303(3) in relation to the contracting of such a debt as is referred to in that section the Court, on the application of the liquidator or any creditor or

A contributory of the company, may, if it thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

(3) When the Court makes any declaration pursuant to subsection (1) or (2), it may give such further directions as it thinks proper for the purpose B of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any charge or any interest in any charge on any assets of the company held by or vested in him or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation C or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(4) For the purpose of subsection (3) "assignee" includes any person to whom or in whose favour by the directions of the person liable the debt, D obligation, or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

E (5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1) every person who was knowingly a party to the carrying on the business with that intent or purpose shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or ten thousand ringgit.

F (6) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under subsection (1) or (2) the liquidator may himself give evidence or call witnesses.

G **[24]** The determination of the issue before this court rests on the interpretation of s. 304(1) and whether the facts of this case fall within the meaning of that subsection. It is necessary to establish that there was an 'intent to defraud creditors of the company'. This requires an element of dishonesty. The standard of proof required is the civil standard for fraud, H namely, on the balance of probabilities as confirmed by the Federal Court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 10 CLJ 385. It is therefore sufficient if on the evidence before the court it appears on the balance of probabilities (as opposed to proving beyond reasonable doubt) that the business of Bistari Land had been conducted with intent to defraud creditors or for any other fraudulent purpose (see *LMW Electronics Pte Ltd v.* I *Ang Chuang Juay & Ors* [2010] 4 CLJ 849; [2010] 1 MLJ 185, *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569; and *Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors* [2012] 1 LNS 734; [2012] 10 MLJ 706).

[25] There is no question that the plaintiff is a 'creditor' of Bistari Land. The Federal Court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors (supra)* adopted with approval the High Court's observation in *Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors* [2006] 7 CLJ 364 as to the interpretation of the word 'creditor' in s. 304 to include 'contingent or prospective creditor'. More specifically, the Federal Court at para. 73 of its judgment held:

> [23] The above authorities clearly say that a plaintiff who has a pecuniary claim against the company is a 'prospective creditor' to the company and by virtue of the definition in s 217 of the Companies Act 1965, is also a 'creditor' for the purpose of winding up process of the company including for the purpose of s 304 of the Act. Being a creditor (or prospective creditor) the plaintiff has the necessary *locus standi* to institute an action against the fourth defendant under s. 304(1) of the Companies Act 1965.

[26] It is indisputable that the plaintiff was at the very least a contingent creditor at the time Bistari Land was receiving the proceeds from the sale of its lands. The plaintiff had already issued the bill and had filed proceedings to recover the payment thereof. In any case, by the time this action was commenced, the plaintiff's proof of debt had already been admitted by the liquidator of Bistari Land.

[27] What is the 'business of the company that has been carried on with intent to defraud the creditors of the company or for any other fraudulent purpose' in this case?

[28] Firstly, the plaintiff claimed that Bistari Land had defrauded them by intentionally concealing the fact that it had been served with the statutory notice, that the summary judgment had been entered against the company and that the winding-up petition had been filed against the company on 26 October 2015. The plaintiff further claimed that Bistari Land had intentionally and fraudulently led the plaintiff into believing that there were no risks of the company dissipating its assets. Instead, contrary to the averment, Bistari Land had permitted the transfer of RM4,922,008 from Bistari Land's account to WPK's personal account on 19 June 2014.

[29] Secondly, the plaintiff further contended that Bistari Land had received an aggregate sum of RM71,310,614.46 from the three tranches but had not provided satisfactory explanation as to how the company had dealt with the monies. More specifically, WOK and WPL had permitted Bistari Land to be wound up instead of applying the payments from the three tranches to pay its creditors. This suggests that the defendants had wrongfully dissipated the monies with the intent to defraud the creditors and/or for fraudulent purpose.

[30] The plaintiff relied on *Siow Yoon Keong v. H Rosen Engineering BV* (*supra*) where our Court of Appeal had adopted the case of *Re Sarflax Ltd* [1979] 2 WLR 202 which in deciding s. 332(1) of the UK Companies Act

1948 (the equipollent of our s. 304(1) of the CA 1965) had held that the expression 'carrying on any business' was not necessarily synonymous with actively carrying on trade, and that the collection of assets acquired in the course of business and the distribution of the proceeds thereof in payment of debts could constitute the carrying on of "any business" for the purpose of the section. In that case, the application was based on the fact that before the advent of liquidation the company had distributed its assets to some of its creditors including its holding company resulting in the applicant not being able to recover its debts.

[31] Section 304(1) of the CA 1965 and the present s. 540(1) of the CA 2016 deal with fraudulent trading which applies when the business of the company has been carried out with intent to defraud the creditors or for any fraudulent purpose. To succeed, two elements must be proven on the balance of probabilities, namely, firstly, that the business of the company had been carried on with intent to defraud creditors or with a fraudulent purpose and secondly, that the defendants were knowingly parties to the carrying on of the business in that manner.

[32] One possible instant where there could be fraudulent trading would be if the company continues to carry on business and incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts (see: *Re William C Leitch Bros Ltd (No 1)* [1932] Ch 71 (Ch D); and *Gerald Cooper Chemicals* [1978] 2 All ER 49). Applying this to the present case means that the court will have to consider there was fraudulent trading at the time when the plaintiff was engaged and continued to be engaged by Bistari Land to render its legal services. The question to ask is whether WPK and WPL had intentionally allow Bistari Land to incur the debts to the plaintiff knowing that Bistari Land had no real prospect of those debts being paid?

[33] In my judgment, no such evidence had been adduced before the court by the plaintiff to show that at the time Bistari Land engaged the plaintiff for its legal services, WPK and WPL knew or were aware that Bistari Land had no prospect of paying their fees. Indeed, there is no evidence that Bistari Land was not in a position to pay its debts at that time at all. In fact, it is not disputed that Bistari Land had already paid the plaintiff a sum of RM484,750 towards its fees. As regards the bill, Bistari Land had disputed the quantum charged.

[34] The other possible instance where fraudulent trading may arise is where after the company had incurred the debts, steps are taken with the intent to avoid making payment to the creditors.

[35] In *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68, Rosen had completed works between Rosen and Petronas Gas Sdn Bhd pursuant to which Petronas made payments to Ventura Industries Sdn Bhd totalling RM1,067,100. Under an agreement between Ventura and Rosen, Ventura

would retain 20% and the balance of 80% to be paid to Rosen. Ventura paid a sum of RM423,000 to Rosen but failed to pay the balance of RM423,000. Siow Yoon Keong, as the managing director and *alter ego* of Ventura, had used Ventura's funds to invest in shares on the stock exchange under his own name, instead of discharging the debt to Rosen. Having acquired the shares, partly using Ventura's funds and partly his own funds, Siow Yoon Keong realising that he was about to incur losses on his investments, arranged for a company resolution to be passed by the board of directors to ratify the investment and the use of the company's funds, including that which was due to Rosen. This had the effect of transferring the losses on the investments to the company. The company's funds were used to pay Siow Yoon Keong's losses and the company was left with no funds to pay Rosen, to whom RM423,000 was due.

[36] The Court of Appeal in applying s. 304(1) of the CA 1965 held that it was very clear that the intention of Siow Yoon Keong was to defraud Rosen, the creditor and it was also equally clear that it was done for fraudulent purpose. Siow Yoon Keong was held to be personally liable for the debt and to pay Rosen the balance sum of RM423,000 together with interest in respect of the judgment obtained by Rosen against Ventura.

[37] The Court of Appeal found that the resolution passed to ratify the investments and the use of the company's funds for the purpose of the investments constituted 'carrying on of business of the company'.

[38] In our instant case, what the plaintiff has also rely on events post the debts being incurred as its basis to invoke s. 304(1) of the CA 1965. There are more than one instant relied upon by the plaintiff to support its claim that WPK and WPL had carried on the business of Bistari Land with intent to defraud the plaintiff and other creditors or with a fraudulent purpose post the debt being incurred.

[39] Firstly, the plaintiff relied on the failure to disclose the statutory notice and the summary judgment at the time of the injunction application. With respect, I do not think that this failure *per se* meets the requirements under s. 304(1).

[40] The focus of the WPL's affidavit was to resist the injunction application. It cannot be said that the non-disclosure was necessarily intended to defraud the plaintiff or for a fraudulent purpose unless there is further evidence that at the material times, the defendants had intended to dissipate the RM32,193,108.35 that the company was expecting to receive by 30 September 2015. There was no such evidence. The intention of filing the WPL's affidavit was to oppose the plaintiff's injunction application.

[41] The averments made in WPL's affidavit must necessarily be considered in the light of the background facts existing as at the date of the affidavit. There is no evidence adduced by the plaintiff that as at 11 September 2015 (the date the WPL's affidavit was affirmed), the

defendants had an intention to dissipate its assets and/or to defraud the plaintiff or any of the company's creditors. In fact, the undisputed evidence shows that Bistari Land had by that time paid the plaintiff a sum of RM484,750 for the legal services rendered as and when payments were requested by the plaintiff. The bill for RM5,907,500 was not paid because Bistari Land had considered the amount to be 'grossly excessive'.

[42] I accept WPL's testimony that when he affirmed in para. 21(6) of WPL's affidavit that Bistari Land was not commercially insolvent and had no intention to dissipate its assets, WPL was acting on the advice of the company's legal advisor that a company is only deemed to be insolvent if it cannot pay its debts as and well it fell due. There was nothing to indicate that the position was otherwise. Indeed, based on the summary of financial information filed with the Suruhanjaya Syarikat Malaysia ('SSM'), the non-current assets of the company exceeded the non-current liabilities by approximately RM45 million.

[43] As regards the winding-up petition, this had not been filed yet at the time of the WPL's affidavit. Accordingly, it cannot be said that there was non-disclosure of this fact in the WPL's affidavit.

[44] Further, I am also not convinced that the non-disclosure of the statutory demand, the summary judgment and or even the winding-up petition comes within the phrase 'carrying on of business of the company' as the filing of the affidavit by WPL is not an activity that was undertaken for any financial gain or to achieve profits for the company or is part of the usual business activities of the company. The non-disclosure was also not in a nature of a financial transaction associated with and/or routinely undertaken by a company.

[45] The next action relied upon by the plaintiff alleging fraudulent trading involves the transfer of RM4,922,008 to WPK's personal account on 19 June 2014. On this point, I agree with learned counsel for the defendants that the said transfer cannot be said to be intended to defraud the plaintiff since Bistari Land was only issued with the bill sometime on 2 July 2014, after the transfer. The evidence shows that at the time the sum of RM4,922,008 was transferred out to WPK's personal account, Bistari Land had already paid to the plaintiff a sum of RM484,750 towards its legal fees. There is no evidence to indicate that the defendants were expecting the plaintiff to issue the bill at the time of the transfer of the sum into WPK's personal account.

[46] Whilst the company had on 19 June 2014 transferred the sum of RM4,922,008 from its account to WPK's personal account, there is nothing to suggest that with the transfer, Bistari Land would be left in no position to meet its liabilities as and when they fall due. It must be noted that at this time, the statutory demand had not been issued and Bistari Land was expecting substantial payments in 2015 from the SPA for its lands.

[47] Finally, the plaintiff relied on the three tranches of the payments from the proceeds of sale that was received by Bistari Land, in particular, the final tranche. In this regard, it is not disputed that Bistari Land was to receive the final tranche of the payments from the proceeds of sale of the lands sometime on 30 September 2015, which WPL had conceded during cross-examination, would be more than adequate to pay all the debts of Bistari Land at the material times. WPL in fact testified that as at 11 September 2015, Bistari Land was still in operation and did not have any problem meeting its financial obligations.

[48] More significantly, WPL had admitted that the three tranches of payments including the final tranche of RM32,193,108.35 were indeed received by Bistari Land. He testified that Bistari Land had used the payments received to pay its creditors. He agreed that the sums received would have been sufficient to pay all of Bistari Land's creditors including the plaintiff's bill and the debt to the Government of Malaysia in Suit 21. However, WPL could not explain why Bistari Land did not proceed to pay the Government of Malaysia's statutory demand which had led to the winding-up petition filed against the company.

[49] In *Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors* (*supra*), the directors made two payments of dividends even though the company was not making any profits in clear breach of s. 365(1) of the CA 1965 resulting in the company lacking sufficient funds to pay the arbitration award. More specifically, this was what the learned Judicial Commissioner said:

> [23] In *Winkworth v. Edward Baron Development Co Ltd* [1987] 1 All ER 114, at p. 118 (HL), Lord Templeman said:
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> > A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.
>
> [24] Following the aforesaid authorities and on a balance of probabilities, I find that the first and third defendants as directors have acted to the prejudice of the creditors and infringed s 365(1)-(2)(b) of the Companies Act 1965 by willfully paying out or permitting to pay out the second and third dividend in the existence of the said arbitration award and they have thereby failed to take into account the interests of creditors of the company of the amount due by the company to the creditors. By paying out RM4.3m dividends from the alleged RM4,340,522 'retained profits' and RM7,266 'profit after taxation' in 2001, leaving behind a meagre sum of RM47,788 (C p 224) as profits, I find no reasonable prospect of the creditors ever receiving payment of the debt as in the award because the company monies which could probably be used to pay the creditors were paid out to third defendants as dividends in the sum of RM4.3m. The reasonable inference to be drawn from such act of the first and third defendants is that the company business was carried on by them with

A intent to defraud creditors. It is apt herein and suffices to cite what had been held by Maugham J in *Re William C Leitch Bros Ltd* [1932] 2 Ch 71 as quoted by His Lordship Abdul Hamid Mohamad JCA (later CJ) in *Siow Yoon Keong v. H Rosen Engineering BV* on what the phrase 'with intent to defraud creditors ... or for any fraudulent purpose' connotes as follows:

B > In *Re William C Leitch Bros Ltd* [1932] 2 Ch 71 Maugham J held at p 77 that 'if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intend to defraud.

C **[50]** The High Court held that the directors were personally liable to the plaintiff as creditor of the company as the unlawful payment of dividends was an act done with the intent to defraud the creditors and/or for a fraudulent purpose. There is no doubt that the declaration of dividends is a financial transaction and is one of those activities that a company ordinarily carried D out as part of its business.

[51] In the present case, does the fact that the defendants are not able to explain what had happened to the RM71,310,616.46 sufficient to discharge the plaintiff's burden of proof that the prerequisites of s. 304(1) of the CA 1965 have been satisfied? Should the court draw an adverse inference against E the defendants for their failure to adduce any documentary evidence at all as to where the sums under the three tranches had gone?

[52] In *Huatah Sdn Bhd v. Yap Chee Kian & Ors* [2020] 2 CLJ 560; [2019] MLJU 842, Justices Nantha Balan held that an adverse presumption should F be drawn against the defendants based on the destruction of the company's books and records in violation of s. 245(3) of the CA 2016 that the exorbitant expenses incurred by the company, the alleged payment made to all creditors (except the plaintiff) and the writing off of the debts owed to the company are manifestation of fraudulent trading by the defendant. At para. 65 of his judgment, His Lordship stated:

G > In my view, based on the destruction of the books and records of BSSB (in violation of **Section 245(3)** of the **Companies Act 2016**) it is only proper in the circumstances that an adverse presumption should be inferred against the defendants, namely that the exorbitant expenses incurred by BSSB, the alleged payments made to all creditors, (except the H plaintiff) and the writing off of debts owed to BSSB, are manifestation of fraudulent trading by the defendants. Taking all of the circumstances into account, the inference to be drawn here is that the books and records of BSSB were deliberately destroyed by the defendants to hinder and prevent the liquidator from ascertaining the truth as regards the financial affairs of BSSB and to verify the balance sheet and the reasonableness I of the expenses that were incurred. (emphasis added)

[53] The adverse presumption was based on the English Court of Appeal case of *Malhotra v. Dhawan* [1997] EWCA Civ 1096 where it enunciated that an adverse presumption may be drawn if a party is responsible for the unavailability of documents because of its actions when litigation is contemplated, or even before litigation is contemplated if that presumption is consistent with other available evidence and there was a possibility of a claim at the time.

[54] The relevant passages of the judgment where the principles established in *Malhotra v. Dhawan* (*supra*) are set out below:

> [47] However, according to the plaintiff, the defendants conduct in disposing of the books and records of BSSB is most sinister and an adverse inference should be drawn or presumed from such conduct.
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> [48] In this regard, the plaintiff relied on the English Court of Appeal case of *Malhotra v. Dhawan* [1997] EWCA Civ 1096; [1997] 8 Med LR 319 where it was enunciated that parties to litigation need to preserve disclosable documents "as soon as litigation is contemplated". The case also highlights that an adverse presumption may be drawn if a party is responsible for the unavailability of documents because of its actions even before litigation was in contemplation, if that presumption is consistent with other available evidence (and there was a possibility of a claim at the time). Thus, where documents are no longer in a party's possession or where a party has disposed of documents or information relevant to a particular issue, the court should, in an appropriate case, presume against that party when resolving the issue.
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> [49] In *Malhotra*'s case, there had been litigation as to the payment due on fees earned during the partnership. One party had destroyed the evidence which would have settled many issues. The court discussed the principle as to when an adverse presumption should be made against a destroyer of evidence. The principle that was established by that case was that if it is found that the destruction of the evidence was carried out deliberately so as to hinder the proof of the plaintiffs claim, then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the court to disregard the evidence of the destroyer upon the application of the presumption.
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> [50] Secondly, if the court has difficulty in deciding which party's evidence to accept then it would be legitimate to resolve that doubt by the application of the presumption.
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> [51] Thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, then the presumption has no application and the judge cannot be required to accept evidence he does not believe or to reject evidence he finds to be truthful.

[55] It is significant to note that prior to Bistari Land being wound up on 29 January 2016, the company had received the sum of RM71,310,616.46 from the proceeds of sale of the lands. Bistari Land's debts to Malayan Banking Berhad and to Lembaga Lebuhraya Malaysia were satisfied directly

from the purchase price before the balance purchase price of the aforesaid RM71,310,616.46 was disbursed to it. WPL himself admitted that the said sum was more than sufficient to settle all the debts due to Bistari Land's creditors at the time, including the plaintiff's.

[56] However, despite receiving the said RM71,310,616.46, both WPK and WPL had allowed Bistari Land to fall into liquidation by its failure to pay the Government of Malaysia the sum demanded under the statutory demand.

[57] What is crucial is the fact that WPL could not proffer any explanation, let alone satisfactory explanation to account for the RM71,310,616.46 received by the company. As the only two directors and cheque signatories to the company's accounts, both the defendants have direct and personal knowledge as to how the said sum had been spent. They are in a position to give an account as to the whereabout of the money that was received. Yet, not a single documentary evidence has been produced to show how the money was spent. Indeed, all that WPL could say during cross-examination was that he was merely following the instructions given by WPK and that some creditors were paid. The following are the relevant testimony given by WPL during cross-examination:

Haz: En Eddy. Kalau berdasarkan kepada jumlah yang diterima oleh Syarikat ini, 70 juta ditolak bayaran-bayaran yang dibuat kepada peguam dan Lembaga Lebuhraya, jumlah tersebut adalah cukup untuk membayar hutang-hutang pemiutang?

Wong: Ia.

Haz: Cukup atau lebih dari cukup?

Wong: Cukup untuk membayar.

Haz: Cukup untuk membayar ia dan cukup untuk membayar tuntutan yang dibuat oleh Lembaga Hasil Dalam Negeri sebanyak 4 juta lebih. Terima 70 juta. Tuntutan Lembaga Hasil Dalam Negeri 4 juta lebih. Ada cukup untuk membayar?

Wong: Yes.

Haz: Kalau cukup, bermakna tidak perlulah sehingga ke tahap Lembaga Hasil Dalam Negeri menggulungkan syarikat. Duit sebanyak 70 juta. Hutang Lembaga Hasil Dalam Negeri 4 juta. Cukup untuk bayar. Tetapi tidak bayar. Jadi tak perlulah, kalau betul cukup membuat bayaran, tak perlulah sampai ke tahap syarikat digulungkan. Betul tak?

Wong: Soalan ini kena merujuk kepada Defendan 1.

[58] Clearly, WPL had acknowledged that the proceeds of sale were used to pay other creditors of Bistari Land except the plaintiff and the Government of Malaysia. Instead of paying them, the company was allowed to be wound up and there is no account of where the balance proceeds had gone to.

[59] In *Kuthubul Zaman Bukhari & Anor v. Tsai Su Chu & Ors* [2013] 9 CLJ 524, the court found the defendants therein had intended to defraud the creditors when they dissipated the assets of the company and the court arrived at that finding because the company was not facing or suffering from any financial hardship. At pp. 529 to 530 the court held as follows:

> As pointed out by P, D9 had not faced any downturn in its business or ceased operations. However, the manner in which the assets totalling RM2,900,000 (cash of RM2,400,000 and inventory stock of RM500,000) were dissipated within a short span of time called into question the motive behind the move. There was no plausible reason to deal with remaining assets and funds of D9 in such a suspicious manner other than to deprive P of any claim that may arise in due course.

[60] Further, in *Morris v. State Bank of India* [2003] EWHC 1868 (Ch), Patten J said:

> Knowledge includes deliberately shutting one's eyes to the obvious, provided that the fraudulent nature of the transactions did in fact appear obvious … It is well established that it is no defence to say that one declined to ask questions, when the only reason for not doing so was an actual appreciation that the answers to those questions would be likely to disclose the existence of a fraud.

[61] I find that the fact that Bistari Land was in a position to pay all its debts after receiving the three tranches coupled with the fact that the defendants had paid other creditors of the company but intentionally avoid paying the plaintiff and the Government of Malaysia, thus permitting the company to be wound up are sufficient for this court to draw an inference that both WPK and WPL had intended to defraud the plaintiff and the Government of Malaysia of their debts.

[62] This court can draw an adverse inference that WPL's inability to provide any explanation as to how the money was dealt with notwithstanding that he was a mandatory cheque signatory of the company's account that the proceeds had been dissipated by both WPK and WPL with the intent to benefit themselves and to defraud the plaintiff and the Government of Malaysia. At the very least, WPL was knowingly a party to the carrying on of the dissipation under WPK's directions. It is incredulous to think that WPL had no inkling as to the whereabout of the proceeds of sale of the lands on the pretext that he was merely acting on WPK's instructions. To be knowingly party to the fraud, the person does not have to know every detail of the fraud or how it is to be perpetrated. It is sufficient if he has a 'blind-eye' or 'Nelsonian' knowledge, namely, deliberately shutting his eyes to the obvious that fraud was involved (see: *Morris v. Bank of India* [2004] 2 BCLC 279). The circumstances in this case support attributing an element of dishonesty on the part of WPK and WPL.

[63] Learned counsel for WPL had submitted that an adverse inference ought not to be invoked against WPL as the burden of proving fraudulent intent is on the plaintiff and that WPL had not consciously withheld or suppressed evidence before this court. He contended that the plaintiff was at liberty to call the liquidator of Bistari Land to give evidence on the financial affairs of the company citing the case of *Joint Management Body of Gurney Park Condominium v. Majlis Perbandaran Pulau Pinang* [2013] 10 MLJ 600.

[64] With respect, I do not share the same view. In the case cited, the Appeal Board was dealing with the failure or omission by the respondent to call any witnesses and that such omission or failure in itself is insufficient to invoke an adverse inference as the burden is on the appellant to prove his case. It does not follow that the plaintiff is not entitled to draw an adverse inference from WPL's inability to provide any explanation as a mandatory cheque signatory of Bistari Land on how the money received was dealt with at all. Further, WPL's refusal or inability to provide any explanation on the whereabout of the proceeds is a conscious withholding or suppression of evidence as he is in a position to provide the same as a mandatory cheque signatory of the account.

[65] As regard the calling of the liquidator to give evidence, there is no reason for the plaintiff to call him as a witness as it is WPK and WPL who have the direct and personal knowledge on the dealings with regards to the three tranches of payments received. If at all, WPL should have called the liquidator if he is of the view that the documents pertaining to the dealings of the proceeds of sale are in the liquidator's possession to vindicate his position that the proceeds were not wrongly dissipated. In fact, it was not even WPL's position that the proceeds were not dissipated from the company.

[66] Accordingly, in my judgment the plaintiff has established on the balance of probabilities that both WPK and WPL had indeed carried on the business of Bistari Land with intent to defraud the creditors of the company or for fraudulent purpose or are persons knowingly parties to the carrying on of the business in that manner and by reason thereof shall be personally responsible for both the debt of the plaintiff and the Government of Malaysia.

[67] Having found that the defendants are personally responsible for both the debts aforesaid, the next question for consideration is whether the defendants are to be directed to make the payment directly to the plaintiff or to the liquidator to contribute to the company's assets in the winding up.

[68] Unlike the provisions of the United Kingdom's Insolvency Act 1986, in particular, s. 213 thereto, where the order that may be granted against persons found liable for fraudulent trading is to hold such persons liable to make such contributions (if any) to the company's assets as the court thinks

proper, the orders that the court may make under our s. 304(1) of the CA 1965 are wider. In *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666, our Court of Appeal held:

> [25] The orders that the court may make under sub-s 304(1) are extensive. Where the conditions are fulfilled, aside from the declaratory orders of accountability, the court may order the defendant(s) to be personally liable for all or any of the company's debts or other liabilities. The wide powers of the court under sub-s 304(1) are appropriate as it serves to ensure that accountability for such fraudulent acts is effective.

[69] Our courts in exercising its powers under s. 304(1) of the CA 1965 have tended to make the delinquent persons assume personal liability and make payment directly to the applicant under the section. All the authorities that have been cited to me by learned counsel for the plaintiff suggest this to be the case.

[70] Whilst the wordings of s. 304(1) of the CA 1965 are materially different from the corresponding s. 213 of the UK Insolvency Act 1986, s. 304(1) is substantially similar to the predecessor to s. 213 of the UK Insolvency Act 1986 which was the s. 332(1) of the UK Companies Act 1948 which reads:

> (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. On the hearing of an application under this subsection the official receiver or the liquidator, as the case may be, may himself give evidence or call witnesses.

[71] As can be seen, the only material difference between the s. 332(1) of the UK Companies Act 1948 and our s. 304(1) of the CA 1965 is that our section can be invoked even if the company is not being wound up. Accordingly, English decisions on the interpretation of the said s. 332(1) are still relevant and useful in our consideration of s. 304(1) of the CA 1965 especially in cases where the company has been wound up.

[72] When the court makes a declaration that the directors are to assume personal responsibility for the debts of the company that has been wound up, the question arises as to whether the delinquent directors are to make the payment directly to the applicant under the section or to be directed to pay into the common assets of the company.

[73] This was the issue before the English Court in *Re William C Leitch Bros, Ltd (No 2)* [1932] All ER Rep 897 when dealing with s. 275 of the UK Companies Act 1929, the predecessor to s. 332(1) of the UK Companies Act 1948. In that case, the court had earlier found as a fact that during the months from 1 March 1930, the company was carrying on business with intent to defraud the creditors, and that it was so carrying on that business to the knowledge, and indeed under the direction of the respondent, a director of the company. Before Eve J, the question was whether the sum recovered from the director ought to form part of the general assets of the company available for all the creditors or whether they ought to be exclusively applied for any restricted class of creditors. The relevant passages are as follows:

> The substantial question is whether they form part of the general assets of the company available for all the creditors, or whether they ought to be exclusively applied for any restricted class of creditors, and in particular for creditors with whom debts were contracted during the period when the business was being carried on with intent to defraud. Representative creditors with whom debts were contracted before and after 1 March 1930, have been made respondents to this application, and have, appeared and supported their respective contentions. On behalf of the latter, it has been urged that, whereas the creditors prior to the fraudulent trading took a fair commercial risk in giving credit to the company, those who executed orders after 1 March 1930, were ex hypothesis defrauded of their money, and that, according to its true construction, this order ought to be treated as one adjusting the rights of these two classes of creditors *inter se*; that the effect of the declaration is to make the amount between film and the defrauded creditors. In support of this contention reliance is placed on the fact that any creditor of the company may apply for the declaration, but there is nothing in this, for a contributory may also apply; but in both cases the making of any declaration would leave the applicant a trustee for the company, or for an unascertained body of creditors. I do not think the section can properly be construed as one for adjusting the rights of creditors *inter se*. Such a construction involves too many difficulties, more particularly under sub-(2).
>
> The section, no doubt, present difficulties, but, in approaching its construction, it is to be noted that it is one of a group of sections – 271 to 277 – dealing with offences antecedent to or in the course of winding up. It can only be brought into operation in the course of winding up, and in cases where there is *prima facie* evidence of the company's business having been carried on for fraudulent purposes. It is not a section which regulates the procedure of an ordinary winding up or controls the administration of the assets of the company. It is directed solely to the particular offence of fraudulent trading and to attaching personal responsibility therefor to directors who knowingly have been parties thereto. It imposes a liability, but does not purport to create any new rights for the creditors. It cannot, in my opinion, be regarded as a section involving any departure from the general scheme of all modes of winding up (s. 156) that is to say, a *pari passu* distribution of the assets. It may well be that the liability imposes is measured by the debts of the defrauded

creditors. But this is not of itself a ground for holding that the ordinary rules of equity are to be disregarded and a preference created in favour of the defrauded class. The position is, in my opinion, in all respect analogous to that of the "B" contributories. Their liability to contribute is fixed by the amount of indebtedness existing at the time when they respectively ceased to be members, but their contributions are not applicable to the discharge of that indebtedness, but form part of the general assets of the company for the payment of all the creditors; *Webb v. Whiffin* (1).

The conclusion I arrive at is that all moneys recovered by the liquidator under the declaration of April 8 ought to be dealt with by the applicant as general assets and applied accordingly.

[74] This position by Eve J that the amount recovered from the delinquent director ought to be dealt with as general assets of the company and to be applied *pari passu* was put into some doubt by Lord Denning in *Re Cyona Distributors Ltd* [1967] 2 WLR 369.

[75] In that case, although the Court of Appeal had found that the money recovered did not come under s. 332 of the UK Companies Act 1948, Lord Denning by way of *obiter dicta* made the following observation:

[His Lordship read section 332(1) of the Companies Act, 1948. And continued:]

In my judgment, that section is deliberately framed in wide terms so as to enable the court to bring fraudulent persons to book. If a man has carried on the business of a company fraudulently, the court can make an order against him for the payment of a fixed sum: see *In re William C. Leitch bros, Ltd*. An order can be made either at the suit of the liquidator, etc, or of a creditor. The sum may be compensatory. Or it may be punitive. The court has full power to direct its destination. The words are quite general : "all or any of the debts or other liabilities of the company as the court shall direct". By virtue of these words the court can order the sum to go in discharge of the debt of any particular creditor; or that it shall go to a particular class of creditors; or to the liquidator so as to go into the general assets of the company, so long as it does not exceed the total debts or liabilities. Of course, when an application is made by a liquidator, the court will usually order the sum to go into the general assets, as Eve J did in *In re William C. Leitch bros, Ltd (No. 2)*, but I do not think it is bound to do so. Certainly when an application is made by a creditor who has been defrauded, the court has power, I think, to order the sum to be paid to that creditor. In short, I think the words of the section are to be given their full width. When a creditor applies, as the commissioners did here, he applies on his own account. He does not apply as being under a trust for the other creditors or for anyone else. He is the master of his own application. He can discontinue his application, if he likes, without getting the sanction of the liquidator. But no doubt the liquidator should always be made a party to the proceedings, so that the interests of the other creditors can be safeguarded.

[76] However, Lord Denning's opinion was not shared by Russell LJ whose strong dissenting view is expressed in these passages:

> This contention is based upon section 332 of the Companies Act, 1948, first introduced in the Act of 1928. This section empowers the court in a winding up to declare that any persons knowingly parties to the carrying on of the business of the company (a) with intent to defraud creditors of the company or creditors of anyone else or (b) for any other fraudulent purpose shall be personally responsible (without any limitation of liability) for all or any of the debts or other liabilities of the company, as the court may direct. This jurisdiction may be invoked by application made by the official receiver or liquidator, or any creditor or contributory of the company.
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> The first step in the liquidator's argument against the commissioners in this case involves the proposition that the jurisdiction of the court to declare personal responsibility is one which can only result in an accretion to the assets of the company in the hands of the liquidator. The commissioners contend that the section enables the court to declare the person in question personally responsible to **particular creditors** – that is, to order payment to be made either to the liquidator as part of the fund for distribution in the winding up, or to particular creditors of the company or both, the court having discretion not only in respect of the personal responsibility but also in respect of its result.
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> Subsection (2) provides that the court, when it makes a declaration of responsibility, "may" give such further directions as it thinks proper for the purpose of giving effect to that declaration, and particularises various such directions. These include charging the declared liability of the relevant person upon anything due to him by the company, or upon any charge on assets of the company held by or vested in either that person, or another on that person's behalf, or any assignee (widely defined) of that person unless *bona fide* for value without notice of the fraudulent trading in question.
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> Subsection (4) provides that a declaration of responsibility under subsection (1) is deemed to be a final judgment within section 1(1)(g) of the Bankruptcy Act, 1974. As was stated by Maugham J, in the *Leitch (No 1)* case, this implicitly requires the declaration to be expressed in terms of a sum of money. But additionally it is necessary that there should be someone entitled to enforce the deemed judgment and served a bankruptcy notice based upon it; and see the final sentence of paragraph (g) of section (1) of the Bankruptcy Act, 1914. It is observed that section 332 does not envisage as essential to its working more than a simple declaration of personal responsibility for $x, being all or part of the debts or other liabilities of the company; no order that the person shall pay the sum to anyone in particular is required or in terms envisaged. This is certainly consistent with the contention that the section never envisages any outcome of its operation other than the conferring upon the liquidator as such a right to enforce the personal responsibility as an addition to the assets of the company on hands.

In the two *Leitch* cases, before Maugham J and Eve J respectively, it is, I think. Apparent that nobody concerned thought that there could be any but two constructions of this section: one, that any declaration must swell the general assets of the company in liquidation; the other, that any declaration must benefit as a class and be apportioned among only those creditors of the company who have been defrauded: see *Leitch (No 1)* and *Leitch (No 2)*. The sum of $6,000 was ordered to be paid to the liquidator, and which of those two constructions of the section was correct was left to be dealt with on an ordinary summons in the winding up (not under the then equivalent of section 332), and was so dealt with by Eve J in *Leitch (No 2)*. It is true that Eve J refers to an argument on the effect of the order made by Maugham J, but, as I understand it, his decision was on the question which of those two constructions of the section was correct. Maugham J himself in *In re Patrick and Lyon Ltd* thought that Eve J was dealing with the section.

I have no doubt that Eve J was correct in holding that the section was not one which conferred the benefit of any declaration exclusively upon defrauded creditors of the company. The present significance of those two cases is that it did not occur to anyone that there was a discretion in the court to decide who was to benefit from the declaration and in what proportion. The most powerful argument in favour of the contention that such a discretion exist lies in the use of the phrase "personally responsible … for all or any of the debts or other liabilities of the company as the court may direct". Instead of a provision empowering the court in the relevant circumstances to order the person to contribute to the assets of the company a sum equivalent to all or any of the debts, etc.

But there are, it seems to me, several objections to the suggested construction. The liquidator must get on with distribution of the assets among creditors in accordance with their admitted proofs. A declaration in favour of a defrauded creditor might be made at any time, and the enforcement by him of the declaration might bear fruit at some uncertain point of time, or in driblets, or not at all: and all outside the purview of the liquidator. How is such a system to be fitted into the scheme of liquidation? Further, if declarations may be made in favour of particular creditors, perhaps on different applications, how are priorities as among them to be solved?

I have already referred to the fact that an order to pay to any particular person is not envisaged as an essential part of the scheme of the section. And it seems to me that personal responsibility for a sum stated, measured by reference to all or any of the debts of the company, is a perfectly appropriate description of responsibility to **the company** which has incurred the debts without it being in any way necessary to extend it to embrace also responsibility directly to particular creditors.

I would hesitate to construe the section in a manner which never occurred to Maugham J and Eve J as a possibility. But in any event I am of opinion that it is not the true construction, but that section 322 can result only in an accretion to the assets of the company for distribution in due course of winding up. (emphasis added)

[77] This issue as to whose favour the recovery under s. 332 of the UK Companies Act 1948 can be granted to was put to rest by the Court of Appeal in *Re Esal (Commodities) Ltd, London and Overseas (Sugar) Co Ltd And Another v. Punjab National Bank* [1997] BCLC 705.

[78] In *Re Esal* (*supra*), the liquidator of the company commenced an action against the bank under s. 332 seeking a declaration that the bank had been knowingly a party to the carrying on of Esal's business with intent to defraud creditors of Esal and for other fraudulent purposes and that it was liable to make such contributions to the assets of the company as the court thought proper. One of the issue before the court was whether the applicant's s. 332 summons could lead to a judgment for payment to them directly.

[79] Peter Gibson LJ, after holding that the views expressed by Lord Denning in *Re Cyona Distributors Ltd* (*supra*) on s. 332 were mere *obiter dicta*, nevertheless, proceeded to reject the same. Firstly, he held that s. 332(1) does not state to whom moneys should be paid. Secondly, he opined that the discretion in s. 332(1) appears to be a discretion to direct which of the debts and liabilities the delinquent is to be responsible and not to whom it should be paid. He further agreed with Russell LJ that a declaration that can only benefit the company does not entail that an applicant creditor must be a trustee. He then further held at p. 715 of the report as follows:

> But I agree with the judge that it does not follow that the section should be construed so as to allow the applicant creditor to procure a payment under s. 332 directly in his own favour. In the ordinary case the creditor will receive his reward through participation in the distributions in the liquidation of the increased assets of the company. The judge suggested that it is open to liquidators who cannot or choose not to pursue a s. 322 application which a creditor is willing to pursue to agree terms (with the sanction of the court or of the Committee of Inspection) with the creditor as to some distribution other than *pari passu* of whatever those proceedings might yield by way of judgment in the company's favour. The commercial sense of this is obvious but it is unnecessary to decide now whether this suggestion is good law.
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> Like the judge I find Russell LJ's reasoning on the effect of s. 332 to be more cogent than that of the majority. An important factor for Russell LJ was the scheme of liquidation under the Companies Acts, with its requirements of a *pari passu* distribution of assets, subject only to carefully defined preferential payments. It would be surprising if Parliament by s. 332 intended to allow a creditor or contributory to take for himself in full what otherwise at the suit of the liquidator would, as was held in *Leitch (No 2)*, only swell the assets of the company to be distributed in accordance with the statutory scheme. If a creditor was able to obtain payment of his debts directly, as Russell LJ asked ([1967] 1 All ER 281 at 287, [1967] Ch 889 at 907):

> How I such a system to be fitted into the scheme of liquidation? Further if declarations may be made in favour of particular creditors, perhaps, on different applications, how are priorities as among them to be solved?
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> To those considerations can be added certain other points. First there is the point made by the judge that the section is limited in operation to where it appears 'in the course of the winding up of the company' that there has been fraudulent trading. This demonstrates that the section does not confer a right for a defrauded creditor or contributory to recover for himself whether or not the winding up has been commenced or completed, and that proceedings under the section are part of the winding up process. Second, the section does not require that the creditor or contributory be defrauded if he is to make an application. Any creditor or contributory may do so and this seems to me to be a strong indication that Parliament's intention was that anyone with a sufficient interest in the recovery of assets for the company might apply under the section. Third, again as the judge pointed out, because under s. 332(4) a declaration of responsibility under s. 332(1) is deemed to be a final judgment under s. 1(1)(g) of the Bankruptcy Act 1914, the counterclaim, set-off or cross-demand which can be raised under that provision must be that which is available between the delinquent and the company, not the delinquent and the creditors. Fourth, where there is fraudulent trading, all creditors (and not only those whose debts are incurred after such trading commences) are likely to suffer and to have a claim to moneys which the delinquent is required to pay (see *Re Purpoint Ltd* [1991] BCLC 491 at 499 per Vinelott J).

[80] What we can gleaned from these English cases are as follows:

(i) these cases deal with fraudulent trading in circumstances where the company has been wound up or where winding-up proceedings have been commenced against the company;

(ii) in such cases, where a claim is made under s. 332(1) of the UK Companies Act 1948, the court had the powers to make a declaration that the delinquent person be personally responsible for all or any of the debts or other liabilities of the company, without any limitation. The discretion to the court is as to the quantum and not the destination of the payment;

(iii) an order to pay to any particular person is not envisaged as an essential part of the scheme under the fraudulent trading section. The personal responsibility for a sum stated, measured by reference to all or any of the debts of the company, is a description of responsibility to the company which has incurred the debts without it being in any way necessary to extend it to embrace also responsibility directly to particular creditors;

(iv) the scheme of liquidation under the Companies Acts, with its requirements of a *pari passu* distribution of assets, subject only to carefully defined preferential payments is the reason why the payment from the delinquent persons ought to be made into the assets of the company. It cannot be the intention of Parliament by s. 332 of the UK Companies Act 1948 to allow a creditor or contributory to take for himself in full what otherwise at the suit of the liquidator would only swell the assets of the company to be distributed in accordance with the statutory scheme; and

(v) the *pari passu* distribution is equitable as all creditors (and not only those whose debts are incurred after such trading commences) are likely to suffer and to have a claim to moneys which the delinquent is required to pay.

[81] In the light of the aforesaid, how should our s. 304(1) of the CA 1965 be construed as regards the destination of the payments ordered to be assumed personally by the delinquent director or person who knowingly was a party to the fraudulent trading?

[82] As alluded to above, unlike s. 332(1) of the UK's Companies Act 1948, our s. 304(1) permits an application to be taken out even when there is no winding-up proceedings commenced against the company. In such a case, where the company may be solvent at the time the order is made against the delinquent, the objections to the court making an order that the delinquent makes the payment directly to the applicant who is the defrauded creditor as expounded by Russell LJ in *Re Cyona Distributors Ltd* and Peter Gibson LJ in *Re Esal* based on the need for a *pari passu* distribution in the scheme of liquidation would be inapplicable.

[83] Whilst it is true that the discretion in s. 304(1) appears to be a discretion to direct which of the debts and liabilities the delinquent is to be responsible and not to whom it should be paid, in my opinion, the words '… personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs' are sufficiently wide for the court to order that the delinquent makes the payment directly to the defrauded creditor where the court finds justifiable circumstances to do so. Indeed, as Russell LJ himself recognised, only by the delinquent paying the defrauded creditor directly can it be said that the delinquent is paying the debt of the company, which is distinct from the delinquent paying the amount to the liquidator or the company.

[84] In fact, the question as to whether the court is empowered to order the delinquent to pay the particular defrauded creditor who applies under s. 304(1) of the CA 1965 or s. 540 of the CA 2016 directly can no longer be in doubt given that such power has been endorsed by our apex court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors*. Although before the

Federal Court, the leave question was whether an employee who makes a claim of statutory emoluments and contribution was entitled to make a claim as a 'creditor' for the purpose of s. 304(1) of the CA 1965, the Federal Court, after answering the leave question in the affirmative had expressly agreed with the findings of the courts below that fraudulent trading within s. 304(1) had been made out and the appellant ordered to be liable to the employees directly.

[85] At the Court of Appeal, in *JCT Limited v. Muniandy Nadasan & Ors And Another Appeal* [2016] 3 CLJ 692, Abang Iskandar JCA (as he then was) in his judgment had also held as follows:

> [63] Having considered the submissions of parties on this issue, we are of the respectful view that the learned trial judge had correctly treated s. 304(1) of CA as a provision that provides for a civil claim against an errant director on the ground of fraudulent trading. If successful, the court **may** order that the errant person to pay compensation to the injured party or parties.
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> (emphasis added)

Although Abang Iskandar JCA was the dissenting judge in that case, nevertheless, the majority judges were in agreement with this aforesaid statement of the law.

[86] What I would like to emphasise however is that the court is not confined to making an order directing the delinquent to make payment directly to the injured party or parties. More so when the company is already in liquidation. In fact, even when the company is not in liquidation, there may be circumstances where an order to pay the injured parties may not be appropriate at all. One such instant is when s. 304(1) is invoked not by a creditor who has been defrauded. The provision is widely drafted to permit any creditor including a creditor who may not be the target of the fraudulent trading to make an application thereunder. Indeed, even a contributory of the company may do so. In such an application, in all likelihood, a positive finding that there is fraudulent trading will probably result in an order for the delinquent to make compensation to the company. It certainly will be inappropriate for the payment to be made to an applicant who has not been defrauded. Indeed, in *Muniandy Nadasan & Ors v. Dato' Prem Krishna Sahgal & Ors* [2016] 1 LNS 592; [2016] 11 MLJ 38, Wong Kian Kheong JC (as he then was), after finding for the plaintiff that there was fraudulent trading ordered the seventh defendant to pay a sum of RM160,000 to the liquidator of the company instead of the plaintiff.

[87] Further, in exercising its powers under s. 304(1) of the CA 1965, the court may order the delinquent person to be personally liable not only for the debts or liabilities owed to the creditor who takes up the action under the said section but for all or any of the company's debts or other liabilities. Again, under such a circumstances, it may be more appropriate that the payments are directed to be made to the company.

[88] In this particular case, this court's power is not confined to ordering that the defendants be personally liable for just the sum of RM5,907,500 owed by Bistari Land to the plaintiff. The defendants can also be ordered to be personally liable for all the debts of Bistari Land that were payable at the time the sum of RM71,310,616.46 were received by the company but wrongly dissipated by the defendants. This is because the court's finding that the business of Bistari Land had been carried on by the defendants with the intent to defraud the creditors of the company or for fraudulent purpose must equally apply to other creditors whose debts were still outstanding at the material time which the defendants had by their conduct, clearly shown an intention not to pay and instead redirected the monies elsewhere. This includes the debts due to Lembaga Hasil Dalam Negeri/Government of Malaysia pursuant to the judgment dated 5 May 2010 in Suit 21 which was the basis for the statutory demand.

[89] In my mind, where a claim is made under s. 304(1) of the CA 1965 or under s. 540(1) of the CA 2016, and the company has already been wound up, unless there are good reasons, any payments by the delinquent directors of the company or persons who knowingly are parties to the carrying on of the business in that manner, ought to be paid to the liquidator as contribution to the company's assets instead of an order for the payment to be made directly to the defrauded creditor who filed the claim. This is to avoid a situation where a creditor is preferred over other creditors. It is also more equitable as it will avoid a situation where one creditor might be able to get paid fully following a fraudulent trading application but as a result of making the payment, the delinquent is left impecunious and unable to pay the other creditors. Such order will also avoid a different result when a liquidator applies under the section from when the defrauded creditor makes the application.

[90] In holding the aforesaid, I am conscious that the case of *JCT Limited v. Muniandy Nadasan* (*supra*) was in fact a case where the company had been wound up at the time the s. 304(1) application was made and the court had nevertheless ordered for the payments to be made directly to the applicants. However, the facts in that case are quite different. The court did not order the delinquent directors to pay other debts of the company apart from the particular debts claimed by the employees. Also, the employees' claims in that case would have enjoyed a priority over the general creditors under s. 292 of the CA 1965 and thus would not have been shared *pari passu* with the general unsecured creditors.

[91] Similarly, in *Huatah Sdn Bhd v. Yap Chee Kian* (*supra*) which is another case where the company had been wound up at the time the s. 304(1) application was made, the learned High Court Judge, S Nantha Balan J (as he then was) did not make any order requiring the delinquent directors to assume personal responsibility for other debts apart from the debts of the

plaintiff. It is also unclear whether the company had any other creditors as the judgment had referred to the fact that the defendant had paid other creditors of the company except the plaintiff.

[92] Accordingly, this court hereby declare that the defendants are jointly and severally liable to pay the sum of RM5,907,500 and the sum due to the Government of Malaysia under the judgment dated 5 May 2010 in Suit S5-21-64-2008 to the liquidator of Bistari Land as contribution to the assets of the company. Both the defendant are jointly and severally to pay the sums so declared within 30 days from the date of service of the order.

[93] On the question of costs, the defendants are jointly and severally liable to pay the plaintiff's costs fixed at RM30,000 subject to the payment of the usual allocatur.

[94] One final note, it is unfortunate that the liquidator of Bistari Land was not made a party to this action. It is desirable that an application under s. 304(1) of the CA 1965 or under s. 540(1) of the CA 2016 should involve the liquidator of the company where the company has been wound up at the time the application is made. It is pertinent to note that under s. 304(7) of the CA 1965 and s. 540(7) of the CA 2016, the liquidator may give evidence or call witnesses himself at the hearing of an application under the section.